# Beta Tegap Sdn Bhd v Majlis Perbandaran Sepang (Attorney General of Malaysia, the intervener)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–259–12 OF 2012
ZALEHA YUSOF J
21 FEBRUARY 2013

*Administrative Law — Judicial review — Application for — AES poles with attached cameras on PLUS and SKVE highway — Proper authority from which permission required for its construction — Applicant required to obtain planning permission from respondent — PLUS and SKVE highway declared as federal roads — Whether AES structures located within federal or state roads — Whether fell within jurisdiction of respondent — Whether respondent acted in excess of jurisdiction — Whether non-disclosure of PLUS and SKVE highway concession agreements would entitle dismissal of judicial review application — Federal Roads Act 1959 s 3 — Road Transport Act 1987 ss 67 & 85 — Street, Drainage and Building Act 1974 ss 70 &72 — National Land Code ss 5, 40, 41 & 62 — Highway Authorities Malaysia (Incorporation) Act 1980 s 21 — Federal Constitution arts 74, 80, 81 & Ninth Schedule*

*Civil Procedure — Intervention — Application for — Attorney General of Malaysia applied to intervene — AES poles with attached cameras — Whether attorney general had locus standi to intervene — Whether a matter of public interest — Whether attorney general's right to intervene independent of rules of the court — Whether court entitled to take judicial notice of public interest generated by AES cameras — Whether issue involves federal government's rights and powers — Rules of Court 2012 O 15 r 6 & O 53 r 8 — Federal Constitution art 145*

*Statutory Interpretation — Building — Automated Enforcement System poles with attached cameras — Whether fell under definition of 'building' — Street, Drainage and Building Act 1974 s 3*

This was an application for judicial review against the decision of the respondent requiring the applicant to apply for planning permission for the construction of a pole and camera ('the AES pole') to be utilised for the operation of the automated enforcement system ('AES') provided by the applicant pursuant to an initiative of the federal government with the primary objective of changing the attitude of drivers as a road safety measure of reducing road accidents and enforcing traffic laws on speeding at KM301.7, North South Highway heading to Kuala Lumpur ('PLUS Highway') and at

KM6.6, South Klang Valley Highway, heading to Kajang near the Shell Petrol Station in Taman Suria Tropika ('SKVE Highway'). The applicant further sought to review the respondent's decision alleging that the applicant had committed an offence under s 70(13)(c) Street, Drainage and Building Act 1974 ('SDBA'), for the construction of the AES pole on the PLUS and SKVE Highways without the respondent's written approval and directing the applicant to take action pursuant to s 72(1)(b) of the SDBA to demolish the AES Pole within 14 days from the date of the notice and pursuant to s 72(1)(c) of the SDBA to cover the AES camera forthwith within 24 hours from the date of the notice. The applicant also sought a declaration that the respondent did not have jurisdiction on the PLUS & SKVE Highway. The Attorney General of Malaysia had applied to intervene on the ground that the matter for determination before the court was a matter of public interest and concerned publication policy. The respondent opposed the application on the ground that the attorney general did not have locus standi to intervene. Both the applicant and the intervener contended that the PLUS Highway and the SKVE Highway had already been declared as a federal road pursuant to s 3 of Act 376. However, the respondent argued that the highways were still on state land and therefore the respondent had jurisdiction over the said highways. The court was faced with the following issues: (a) whether O 53 r 8(1) of the Rules of Court 2012, which is a specific provision under judicial review, was applicable to the attorney general; (b) who was the proper authority from which permission was required before the AES structure could be erected on the said highways; and (c) whether the non-disclosure of the PLUS and SKVE Highway concession agreements would entitle the application for judicial review to be dismissed.

**Held**, allowing the application:

(1) The right to intervene by the attorney general was independent of the Rules of Court 2012 whether it be O 15 r 16 or O 53 r 8. The dispute herein was not a mere private suit. Even if it was, the attorney general had a right to intervene as the issue involved the federal government's rights and powers (see paras 8–10).

(2) The executive authority pertaining to Road Transport Act 1987 ('Act 333') and Federal Roads Act 1959 ('Act 376') are with the federation. Hence, even though the land is still state land, but since the highways had already been declared as Federal roads under these Acts, the state government was under a constitutional obligation to ensure compliance and not to impede or prejudice the exercise of the executive authority of the federation pursuant to these Acts. Pursuant to s 85 of Act 333, the approval to carry out any works of any description in, upon, over or under any federal road vests with the Minister of Works. The respondent clearly had no authority to give any approval as far as federal roads were

concerned. By issuing those notices, the respondent was clearly guilty of an error of law and had acted in excess of its jurisdiction and powers (see para 17(n)–(p)).

(3) On the non-disclosure of the concession agreements, as argued by the respondent, it was not a relevant issue here. Because the issue before the court was an issue of law as to whether the respondent was the proper authority from which permission was required before the AES structure could be erected on the said highways. So whether there was a condition precedent in the concession agreement for the applicant to obtain permission was not relevant (see para 17(q)).

**[Bahasa Malaysia summary**

Ini merupakan permohonan untuk semakan kehakiman terhadap keputusan responden memerlukan pemohon untuk memohon untuk kebenaran perancangan untuk pembinaan tiang dan kamera ('tiang AES') digunakan untuk operasi sistem penguatkuasaan automasi ('SPA') yang disediakan oleh pemohon mengikut inisiatif kerajaan persekutuan dengan objektif utama untuk mengubah sikap pemandu-pemandu sebagai langkah untuk keselamatan jalan raya untuk mengurangkan kemalangan jalan raya dan menguatkuasakan undang-undang trafik pada had kelajuan KM301.7, Lebuhraya Utara Selatan menuju ke Kuala Lumpur ('Lebuhraya PLUS') dan KM6.6, Lebuhraya Lembah Klang Selatan, menuju ke Kajang berdekatan dengan Stesen Petrol Shell di Taman Suria Tropika ('Lebuhraya SKVE'). Pemohon selanjutnya memohon untuk menyemak keputusan responden yang mendakwa bahawa pemohon telah melakukan kesalahan di bawah s 70(13)(c) Akta Jalan, Parit dan Bangunan 1974 ('AJPB'), untuk membina tiang AES di Lebuhraya PLUS dan SKVE tanpa kebenaran bertulis responden dan mengarahkan pemohon untuk mengambil tindakan menurut s 72(1)(b) SDBA untuk merobohkan tiang AES dalam masa 14 hari dari tarikh notis dan menurut s 72(1)(c) SDBA untuk menutup kamera AES dengan serta-merta dalam masa 24 jam dari tarikh notis. Pemohon juga memohon deklarasi bahawa responden tidak mempunyai bidang kuasa terhadap Lebuhraya PLUS dan SKVE. Peguam Negara Malaysia telah memohon untuk campur tangan atas dasar bahawa perkara untuk penentuan di hadapan mahkamah adalah perkara kepentingan awam dan berkenaan dengan polisi penerbitan. Responden membantah permohonan atas dasar bahawa peguam negara tidak mempunyai locus standi untuk campur tangan. Kedua-dua pemohon dan pencelah berhujah bahawa Lebuhraya PLUS dan Lebuhraya SKVE telah pun dideklarasikan sebagai jalan persekutuan menurut s 3 Akta 376. Walau bagaimanapun, responden berhujah bahawa lebuhraya-lebuhraya masih lagi berada di atas tanah negeri dan justeru responden mempunyai bidang kuasa terhadap lebuhraya-lebuhraya tersebut. Mahkamah berdepan dengan isu-isu berikut: (a) sama ada A 53 k 8(1) Kaedah-Kaedah Mahkamah 2012, yang mana peruntukan spesifik di bawah semakan kehakiman, adalah terpakai

terhadap peguam negara; (b) siapakan autoriti wajar dari mana kebenaran diperlukan sebelum struktur AES didirikan di atas lebuhraya-lebuhraya; dan (c) sama ada perjanjian konsesi Lebuhraya PLUS dan SKVE yang tidak dikemukakan membolehkan permohonan untuk semakan kehakiman untuk diketepikan.

**Diputuskan**, membenarkan permohonan:

(1) Hak untuk campur tangan oleh peguam negara adalah terkecuali daripada Kaedah-Kaedah Mahkamah 2012 sama ada A 15 k 16 atau A 53 k 8(1). Pertikaian ini bukanlah sekadar guaman persendirian. Meskipun ia adalah sedemikian, peguam negara mempunyai hak untuk campur tangan memandangkan ianya melibatkan isu hak-hak kerajaan persekutuan dan kuasanya (lihat perenggan 8–10).

(2) Autoriti eksekutif berkenaan dengan Akta Pengangkutan Jalan 1987 ('Akta 333') dan Akta Jalanraya Persekutuan 1959 ('Akta 376') adalah bersama persekutuan. Oleh itu, meskipun tanah adalah tanah negeri, tetapi memandangkan lebuhraya-lebuhraya telahpun dideklarasikan sebagai jalan persekutuan di bawah Akta-Akta ini, kerajaan negeri adalah di bawah kewajipan perlembagaan untuk memastikan kepatuhan dan tidak menghalang atau memprejudis perlaksanaan autoriti eksekutif persekutuan menurut Akta-akta ini. Menurut s 85 Akta 333, kelulusan untuk menjalankan sebarang kerja dengan sebarang deskripsi di dalam, ke atas, terhadap atau di bawah mana-mana jalan persekutuan terletak dengan Menteri Kerja Raya. Responden dengan jelas tidak mempunyai autoriti untuk memberikan apa-apa kebenaran berkenaan dengan jalan persekutuan. Dengan mengeluarkan notis-notis tersebut, responden dengan jelas bersalah untuk kekhilafan undang-undang dan telah bertindak melampaui bidang kuasa dan kuasanya (lihat perenggan 17(n)–(p)).

(3) Berkenaan perjanjian konsesi yang tidak dikemukakan, seperti yang dihujah oleh responden, ia adalah isu yang tidak relevan di sini. Kerana isu di hadapan mahkamah adalah isu perundangan mengenai sama ada responden merupakan autoriti yang wajar di mana kebenaran diperlukan sebelum struktur AES boleh dibina di atas lebuhraya-lebuhraya tersebut. Oleh itu sama ada terdapat syarat duluan di dalam perjanjian konsesi untuk pemohon untuk mendapatkan kebenaran adalah tidak relevan (lihat perenggan 17(q)). ]

**Notes**

For cases on application for, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 278–320.

For cases on application for, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4345–4351.

**Cases referred to**

*1C RV Holdings Ltd v Tri-Par Holdings Ltd* [1996] 3 RPR (3d) 49 (refd)

*Adams v Adams (A-G intervening)* [1970] 3 All ER 572 (refd)

*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA (refd)

*Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224, HC (refd)

*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, HL (refd)

*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

*Ganad Media Sdn Bhd v Metramac Corporation Sdn Bhd & Anor (Pentadbir Tanah Daerah Petaling, third Party)* [2010] MLJU 1361; [2010] 1 LNS 1254, HC (refd)

*Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)

*McKenzie v Ferguson* (1923) 4 DLR 931 (refd)

*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

*Tan Sri Joseph Kurup v Danny Anthony Andipai & Anor* [2009] 3 MLJ 1, FC (refd)

**Legislation referred to**

Civil Law Act 1956 s 3

Federal Constitution arts 74(1), 80(1), 81, 145, Ninth Schedule, List 1-Federal List, Item I

Federal Roads Act 1959 s 3

Highway Authorities Malaysia (Incorporation) Act 1980 s 21(1)

Local Government Act 1976 s 2

National Land Code ss 3, 5, 40, 41, 42, 62

Road Transport Act 1987 ss 67, s 85

Rules of Court 2012 O 15 r 16, O 53 r 8(1)

Rules of the High Court 1980 O 53 r 8(1)

Street, Drainage and Building Act 1974 ss 3, 27(1)(c), 70(1), (13)(c), 72(1)(b), (c) 85

*Alex Nanadaseri De Silva (Gavin Jay Anand a/l Jaya Pal with him) (Bodipalar Ponnudurai De Silva) for the applicant.*

*Gobind Singh Deo (Mohd Haijan Omar and Joanne Chua Tsu Fae with him) (Thomas Philip) for the respondent.*

*Amarjeet Singh a/l Serjit Singh (Suzana bt Atan with him) (Attorney General's Chambers) for the intervener.*

**Zaleha Yusof J:**

**[1]** This is an application for judicial review of the following decision of the respondent:

(a) the respondent's decision ('the respondent's first decision') requiring the applicant to apply for planning permission for the construction of a pole and camera ('the AES pole') to be utilised for the operation of the automated enforcement system ('AES') provided by the applicant pursuant to an initiative of the federal government with the primary objective of changing the attitude of drivers as a road safety measure of reducing road accidents and enforcing traffic laws on speeding at KM301.7, North South Highway ('PLUS') heading to Kuala Lumpur near the Malaysian Highway Authorities Headquarters at Mukim Dengkil, Daerah Sepang, Negeri Selangor ('PLUS Highway'). The applicant was informed of this decision by letter dated 19 November 2012 ('the first notice');

(b) the respondent's decision ('the respondent second decision') requiring the applicant to apply for planning permission for the construction of a pole and camera ('the AES pole') to be utilised for the operation of the automated enforcement system ('AES') at KM6.6, South Klang Valley Highway, heading to Kajang near the Shell Petrol Station in Taman Suria Tropika, Mukim Dengkil, Daerah Sepang, Negeri Selangor ('SKVE Highway'). The applicant was informed of this decision by letter dated 19 November 2012 ('the second notice'); and

(c) the respondent's decision ('the respondent's third decision') that the applicant has committed an offence under s 70(13)(c) of the Street, Drainage and Building Act 1974 ('the SDBA'), for the construction of the AES pole on the PLUS and SKVE Highways without the respondent's written approval and directing the applicant to take action pursuant to s 72(1)(b) of the SDBA to demolish the AES Pole within 14 days from the date of the notice and pursuant to s 72(1)(c) of the SDBA to cover the AES camera forthwith within 24 hours from the date of the notice. The applicant was informed of this decision by letter dated 6 December 2012 which was amended by letter dated 7 December 2012 ('the third notice').

**[2]** Besides, the applicant also seeks a declaration that the respondent does not have jurisdiction on the PLUS and SKVE Highway.

THE INTERVENER'S APPLICATION

**[3]** The Attorney General of Malaysia, vide encl 7 had applied to intervene in

this judicial review application on the ground that the matter for determination before the court is a matter of public interest and concerns publication policy. A

**[4]** The respondent opposed the application on the ground that the attorney general does not have locus standi to intervene based on the Federal Court decision in the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405. In *Bong*'s case the Federal Court held, inter alia, that O 53 r 8(1) of the Rules of the High Court 1980 specifically caters to person claiming an interest in the judicial review proceedings and who wishes to be heard in opposition. It is argued that in the affidavit filed by the attorney general there is no averment that he wishes to be heard in opposition. Hence, the attorney general has failed to meet the test required under O 53 r 8(1). The attorney general also has not shown that he has a direct interest in the matter. The Federal Constitution does not give him power to intervene as required by art 145. The attorney general has also not shown any other law that gives him power to intervene. Further it is also argued that the issue in dispute is a private matter and will not affect the interest of the public. B C D

**[5]** On behalf of the attorney general, it was argued that the application was not made under O 15 r 6 or O 53 r 8 of the Rules of High Court. Nor was it made by virtue of art 145 of the Federal Constitution. The attorney general is the guardian of public interest and the learned senior federal counsel quotes the decision in *Adams v Adams (A-G intervening)* [1970] 3 All ER 572 and argues that the common law position is followed by virtue of s 3 of the Civil Law Act 1956 ('Act 67'). E F

**[6]** I have considered the arguments of the parties. I note that in *Bong*'s case, the proposed intervener was Majlis Agama Islam Selangor. In the instance, the proposed intervener is the Attorney General of Malaysia. The issue before me is therefore whether O 53 r 8(1) which is a specific provision under judicial review, is applicable to him. G

**[7]** Upon considering submissions of learned counsel for the respondent and the learned senior federal counsel for the attorney general, I agree with the learned counsel for the attorney general that the attorney general's position is special. He is not just a person. He is supposed to be a guardian of public interest; he is supposed and expected to act when matters concern public interest or public policy. This is a common law principle which one follow by virtue of s 3 of Act 67. The AES camera concerns the enforcement of traffic laws and I feel the court can take judicial notice of the public interest generated by the AES cameras. H I

**[8]** Hence, I am of the opinion that the right to intervene by the attorney

general is independent of the Rules of Court 2012 whether it is O 15 r 16 or O 53 r 8; as submitted by the learned senior federal counsel.

**[9]** The applicant in the instant case claims that it had obtained the approval of a federal authority ie Lembaga Lebuhraya Malaysia. Whereas the respondent claims that its approval must first be obtained. Hence to me, it is clear that this case would involve constitutional issue ie federal against state's (local authority) power or jurisdiction.

**[10]** To me, it is not a mere private suit. Even if it is, I am of the view that the attorney general has a right to intervene as, as stated earlier, the issue involves the federal government's rights and powers. In *Adam*'s case it was held, inter alia:

> In my view the attorney-general has the right of intervention in a private suit whenever it may affect the *prerogatives of the Crown*, … and he certainly has in such circumstances locus standi at the invitation of the court or *with the leave of the court*.

**[11]** There have been many instances where the attorney general had been allowed or invited by the court to intervene. Refer to *Tan Sri Joseph Kurup v Danny Anthony Andipai & Anor* [2009] 3 MLJ 1 and *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701. I feel, the instant case is of no difference although it pertains to judicial review.

**[12]** I therefore allow encl 7 with no order as to cost.

THE SUBSTANTIVE APPLICATION

**[13]** AES system and background facts:

(a) The AES system is a system where the details and recording of traffic offences is automated. It utilises two forms of tracking devices which include stationary and mobile cameras that take both pictures and videos;

(b) the federal government has introduced the AES towards the objective of reducing road accidents throughout the country;

(c) the implementing authority of the AES is the Road Transport Department ('RTD'). The RTD enforces the traffic laws by issuing summonses to offenders caught by the AES pursuant to the Road Transport Act 1987 ('Act 333');

(d) the applicant pursuant to a contract with the federal government had erected two such AES structures on the side-table at KM301.7 of the North-South Highway ('PLUS') facing the direction of Kuala Lumpur

and on the side-table at KM6.6 of the South Klang Valley Expressway ('SKVE') facing the direction of Kajang ('the highways');

(e) the applicant erected the AES structures after obtaining the permission of Lembaga Lebuhraya Malaysia ('LLM') which is the Highway Authority of Malaysia pursuant to the Highway Authority Malaysia (Incorporation) Act 1980 ('Act 231');

(f) the said AES structures are situated in the district of Sepang, Selangor. The local authority for Sepang is Majlis Perbandaran Sepang ('MPS');

(g) MPS made a decision that the erection of the AES structures requires the permission of the local authority under s 70(1) of the Street, Drainage and Building Act 1974 (Act 133);

(h) this decision is communicated to the applicant in the following notices dated 19 November 2012:

(i) notice requiring the applicant to supply for planning permission for the AES structure erected at KM301.7 PLUS Highway;

(ii) notice of offence for erecting a building ie the AES structure at KM301.7 PLUS Highway without permission under s 70(13)(c) of Act 133;

(iii) notice requiring the applicant to apply for planning permission of the AES structure erected at KM6.6 SKVE Highway; and

(iv) notice of offence for erecting a building ie the AES structure at KM6.6 SKVE Highway without permission under s 70(13)(c) of Act 133;

(i) on 6 December 2012, MPS issued a notice directing the applicant to do the following acts:

(i) demolish both the said AES structures within 14 days of receiving the said notice pursuant to s 72(1)(b) of Act 133; and

(ii) cover the both the cameras within 24 hours from receiving the notice pursuant to s 27(1)(c) of Act 133.

**[14]** The Issue:

Who is the proper authority from which permission is required before the AES structure can be erected on the said highways?

**[15]** The applicant's and the intervener's submissions:

(a) Section 3 of the Federal Roads Act 1959 (Act 376) provides:

Power to declare roads, etc., to be federal

A

> 3 The Minister may after consultation with the Government of the State concerned, by order declare any road, bridge, ferry or other means of communication in any Sate to be Federal.

(b) Mr Alex for the applicant and Mr Amerjeet for the attorney general both submit that the respondent has no jurisdiction to issue those notices as the PLUS and SKVE Highways have been declared by the Minister (in exercise of the powers conferred by s 3 of (Act 376)) to be federal roads. Vide PU(A) 9 dated 27 December 1988, the Minister had indeed declared, the PLUS Highways to be a federal road with effect from 15 June 1982 and vide PU(A) 217 dated 25 June 2010 the SKVE highway was declared to be a federal road with effect from 29 June 2010;

(c) on behalf of the attorney general, it is further argued that the Road Transport Act 1987 ('Act 333') was enacted by Parliament using its power under item 1 of List 1 in the Ninth Schedule to the Federal Constitution, by virtue of art 74 cl (1) of the same. Hence, by virtue of art 80 cl (1), the Federation has executive authority over all matters provided in Act 333;

(d) it is also submitted that under Act 333 'Federal Road' means a road declared to be a federal road under federal law. Since the two highways have been declared by order of the Minister to be federal roads, it is the Minister of Works and not the local authority which is the proper authority from whom permission is required before works to erect the AES can be carried out; and

(e) further, both submit that the AES poles do not come within the definition of building and therefore the respondent has acted in access of jurisdiction when it issued the said notices to the applicant.

**[16]** The respondent's submission:

(a) Mr Gobind for the respondent submits that the AES posts and camera were erected on state land and as such falls under the jurisdiction of the respondent. In this regard:

(i) Section 40 of the National Land Code ('NLC') provides:

> There is and shall be vested solely in the State Authority the entire property in—
>
> (a) All State land within the territories of the State …

(ii) 'State land' is defined in s 5 of the NLC as:

> all land in the State (including so much of the bed of any river, and of the foreshore and bed of the sea, as it within the territories of the State or the limits of territorial waters) other than-
>
> (a) alienated land;

(b) reserved land;

(c) mining land;

(d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest, …

(iii) s 41 of the NLC states that the state authority shall have the authority to exercise all powers of disposal as provided under s 42 of the NLC over property vested in it under s 40.

(b) it is further argued that for the purposes of reservation of land, s 62 of the NLC provides that the state authority may, by notification in the *gazette*, reserve any state land for a public purpose. By virtue of s 21(1) of the Highway Authorities Malaysia (Incorporation) Act 1980, MHA will only have jurisdiction over highway lands which have been gazetted by the federal government to be used as highway. It is the respondent's contention that the land on which the AES posts and cameras are erected ('the said land') is state land as it has never been gazetted for the purposes of the PLUS Highway and the SKVE Highway. Hence, the said land falls under the jurisdiction of the respondent and not the MHA. In this regard, the respondent relies on *Ganad Media Sdn Bhd v Metramac Corporation Sdn Bhd & Anor (Pentadbir Tanah Daerah Petaling, third Party)* [2010] MLJU 1361; [2010] 1 LNS 1254. In that case it was decided that until the gazzeting under s 62 of the NLC is done, the land in question remains as state land;

(c) the respondent further submits that the AES poles and cameras do fall under the definition of 'building' as defined under Act 133 by virtue of the word 'post' appearing in the definition. Mr Gobind on behalf of the respondent had argued that the word 'foregoing' in the definition must necessarily relates not only to the first two lines of the definition, but all the four lines. For example, he argued, for many years local authorities had many times, issue notices to demolish walls erected on vacant land, with no house, when the walls were erected without permission; and

(d) on the non gazetting of the land for federal purposes, Mr Malik Imtiaz for the respondent has sought disclosure of the concession agreements from the PLUS Highway and the SKVE Highway to see whether or not there is a condition precedent in requirement of permit of license. The respondent argues that the non-disclosure of the said concession agreements would entitle the court to have the application for judicial review dismissed.

**[17]** Findings of the court:

(a) It is interesting to note how parties have argued on whether the said AES

pole and its camera is a building or not. The applicant persuades the court to look at the decision of the Supreme Court of British Columbia in *1C RV Holdings Ltd v Tri-Par Holdings Ltd* [1996] 3 RPR (3d) 49 which according to the submissions of learned counsel for the applicant applied law from the earlier case of *McKenzie v Ferguson* (1923) 4 DLR 931 which clearly followed the definition of building from the *Century Dictionary* which says that pole fixed in the earth is not a building but a fence or a wall is;

(b) I have read the judgment in *ICRV*'s case. That case involves the interpretation of the word 'building' found in s 32 of their Property Law Act. No definition of building was found in the Act. With due respect, *McKenzie*'s case was only one of the cases considered by the said Supreme Court to determine what is meant by the word 'building' but the said Supreme Court did not follow *McKenzie*'s decision;

(c) our case is different. We do have the definition of 'building' in Act 133. Unlike the said *Century Dictionary*, the word 'post'; 'wall'; and 'fence' are there in its definition of 'building'. The only issue in interpreting that definition is whether the word 'posts', which would without doubt includes poles, appearing in the definition, is to be read as 'post connected to the house, hut, shed or roofed enclosure', before it can be said to be a 'building';

(d) Mr Amarjeet, the learned senior federal counsel for the intervener has argued that the phrases 'and also' and 'connected to the foregoing' are used to avoid anydoubt that a structure such as a 'wall, fence, platform, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge, or any structure support or foundation' if connected to a 'house, hut, shed or roofed encl' would fall within the definition of 'building'.

This is because, he argues, the word 'foregoing' in the phrase 'connected to the foregoing' refers to 'house, hut, shed or roofed enclosure'. He urges the court to note that the word 'house' is defined to include 'dwelling-house, warehouse, office, counting-house, shop, school, and any other building in which persons are employed' and the word 'dwelling house' is also defined to include 'a building or tenement wholly or principally used, constructed or adapted for use for human habitation'. All these items, he says, fall within the ordinary meaning of a building. However for avoidance of any doubt the word 'building' is given a definition of art by including in its sweep the items — wall, fence, platform, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge or any structure support or foundation on the condition that these items are connected to either a house hut, shed or roofed enclosure;

(e) I have considered the arguments put forward by the parties in respect of

the definition of building. Act 133 was enacted in 1974 to, inter alia, consolidate the laws relating to street drainage and building in local authority areas in Peninsular Malaysia. It came into effect in all local authority areas in Selangor on 1 June 1978 vide PU(B)279/1978. Later in 1976 the Local Government Act ('Act 171') was enacted to consolidate the laws relating to local government. As far as Sepang District Council's ie the respondent's area is concerned, it came into effect on 1 September 1994 vide PU(B) 384/1994, both these Acts 133 and 171 concern the powers of local government. In the later Act 171, there is also definition of 'building' in s 2, which is as follows:

> 'building' includes any house, hut, shed or roofed enclosure, whether use for the purpose of human habitation or otherwise, and also any wall, fence, platform, underground tank, staging, gate, post, pillar, paling, frame, hoarding, ship, dock, wharf, pier, jetty, lading-stage, swimming pool, bridge, railway lines, transmission lines, cables, reinfusion lines, overhead or underground pipelines, or any other structure, support or foundation.

(f) in Act 171, the later Act, the phrase 'connected to the foregoing' is missing in the definition of 'building'. I believe it was done in purpose because of the confusion that those words would cause in interpreting the words 'building'. It is clear, without doubt, the word 'post', is defined as a building in Act 171. Looking at this later definition in the Act which also concerns local government, I am of the opinion that those words 'any wall, fence, platform, post', etc appearing in Act 133 must also be read independently of the words 'house, hut, shed, or roofed enclosure' and the phrase 'or any structure support or foundation connected to the foregoing' must not confine to the first two lines of the definition. If in Act 171 a 'post' is a building, it has to be the same in Act 133. Local government cannot have two different definition of the same word in carrying out its daily function. Hence, I agree if we apply s 3 of Act 133, the AES pole with the attached camera is a building under the said section;

(g) but whether Act 133 is applicable in this case, at this stage, is yet to be determined. The court needs to examine who is the proper authority from which permission is required before the AES structure can be erected on the said highways;

(h) art 74 cl (1) of the Federal Constitution empowers Parliament to make laws with respect to any matter enumerated in the Federal List in the Ninth Schedule to the Federal Constitution. If we look at the Federal List, one of the matters is communication and transport which includes roads, if declared to be federal by or under federal law; regulation of traffic by land within one state, carriage of passengers or goods by land and mechanically propelled vehicles. Hence Act 333 was enacted;

(i) s 85 of Act 333 provides that no person should carry out any works of any description in, upon, over or under any road unless plans have been submitted and approved, in relation to a federal road, by the Minister charged the responsibility for works. Section 67 of Act 333 provides that 'Federal road or inter alia means a road declared to be Federal under Federal Law;

(j) s 3 of the Federal Roads Act 1959 (Act 376) provides; inter alia; that the Minister may after consultation with the government of the state concerned, by order declare any road in any state to be federal;

(k) both the applicant and the intervener had already shown to the court that the said PLUS Highway and the said SKVE Highway had already been declared as federal road pursuant to s 3 of (Act 376).;

(l) however, it has been argued by the respondent that the highways are still on state land and therefore the respondent has jurisdiction over the said highways. At this point, I must emphasise that it has never been disputed by the applicant or the intervener that the land is a state land. So, unlike the case of *Ganad Media Sdn Bhd*, the issue here is not whether the land concerned is a state land or federal land.

(m) the point is under art 80 cl (1) of the Federal Constitution, the executive authority of the Federation extends to all matters with respect to which Parliament may make laws. In the instance, the executive authority of the Federation extends to all matter with respect to the federal roads. Further, art 81 of the Federal Constitution also has imposed limitations as to the manner the executive authority of the state is to be exercised by providing that the executive authority of every state shall be so exercised:

(i) as to ensure compliance with any federal law applying to that state; and

(ii) as not to impede or prejudice the exercise of the executive authority of the federation;

(n) it is clear that executive authority pertaining to Acts 333 and 376 are with the Federation. Hence, even though the land is still state land, but since the highways have already been declared as federal roads under these Acts, the state government is under a constitutional obligation to ensure compliance and not to impede or prejudice the exercise of the executive authority of the federation pursuant to these Acts;

(o) I also must stress that the fact that the land is a state land, does not also make the respondent the owner of the land. The local government is a different entity separate from the state government;

(p) again, I must reiterate, pursuant to s 85 of Act 333, the approval to carry out any works of any description in, upon, over or under any federal road

vest with the Minister of Works. The respondent clearly has no authority to give any approval as far as federal road is concerned; and

(q) on the non-disclosure of the concession agreements as argued by the learned counsel for the respondent, I am of the opinion that it is not a relevant issue here. Because the issue before the court is issue of law as to whether the respondent is the proper authority from which permission is required before the AES structure can be erected on the said highway. So whether there is a condition precedent in the concession agreement for the applicant to obtain permission is not relevant.

## THE CONCLUSION

**[18]** We must not lose sight that this is an application for judicial review. Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at pp 233–234 had said as follows:

> The power of the court to interfere in each case is not as appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

**[19]** In Council of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, House of Lords stated that:

> Administrative action is subject to control by judicial review under three heads; (1) illegality; where the decision-making authority has been guilty of an error of law eg. By purporting to exercise a power it does not have; (2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision; (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly

**[20]** When illegality is shown, the court can look into the substance or merit of the decision and not merely the process. Refer to *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147. See also *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224.

**[21]** Based on the above, I am of the opinion that the spots where those AES structures are located are within federal roads and does not fall within the jurisdiction of the respondent. If at all any permission need to be obtained, it has to be from the Minister of Works as provided for by s 85 of Act 333. By issuing those notices, the respondent is clearly guilty of an error of law and has acted in excess of its jurisdiction and powers. Therefore this court has the power

A to interfere in its decision. Hence, the application is allowed. As this is a matter of public interest, I make no order as to costs.

*Application allowed.*

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Reported by Ashgar Ali Ali Mohamed

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